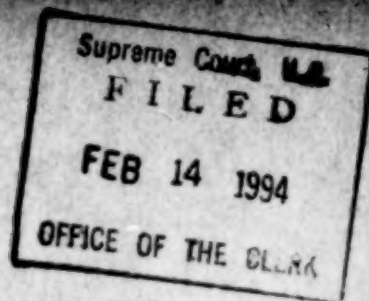


(24)

No. 93-518



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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1993**

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FLORENCE DOLAN,

Petitioner,

- against -

CITY OF TIGARD,

Respondent.

---

**ON WRIT OF CERTIORARI TO THE  
OREGON SUPREME COURT**

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**AMICUS CURIAE BRIEF  
OF THE CITY OF NEW YORK  
IN SUPPORT OF RESPONDENT**

---

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**AMICUS CURIAE BRIEF  
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**INTEREST OF AMICUS CURIAE  
THE CITY OF NEW YORK**

The City of Tigard is not alone in its need as a municipality to develop comprehensive plans for the preservation of open spaces, for dealing with drainage and other problems associated with bodies of water, and for coping with transportation problems caused by increasing congestion. It is also not alone in its imposition of conditions upon a property owner interested in developing



property in a manner that implicates those concerns. Conditional permits assist governmental entities throughout this nation in fulfilling their responsibility to ensure that land is developed in a manner that is not inconsistent with the health, safety, and welfare of its current and future residents.

The Court's review of the takings claim presented in this case is of particular concern to the City of New York as our city deals with challenges to its power to enact requirements or exact conditions of benefit to its citizens. While this case involves dedications required by the City of Tigard in response to petitioner's request for permission to double the size of her existing retail establishment, the challenge has broader implications. By seeking to require governmental entities to demonstrate a precise fit between conditions imposed and the demonstrable adverse impacts of a proposed development, it threatens the ability of states and municipalities to apply such reasonable conditions. Decisions in this area would become exceedingly strained if this Court were to adopt the strict nexus requirement urged upon it by appellant.

"The special permit or exaction zoning technique has a long history in the land use regulatory process in this country." 3 Rathkopf, *The Law of Zoning & Planning* § 41.01 at 41-2. It is not unusual for state and local governments to require the dedication of land for parks, open spaces, streets, sidewalks, schools, and other public purposes, or to impose set-back and height restrictions on developments. To now insist that governmental entities demonstrate an essential nexus or precise fit between dedications and impacts of a proposed developments would unfairly jeopardize constitutional exercise of the police power.

The City of New York urges this Court to affirm the judgment of the Oregon Supreme Court in its holding that,

at most, a developmental exaction need bear but a reasonable relationship to the impacts of the proposed development.

## STATEMENT OF THE CASE

In response to petitioner's request that she be granted permission to build a new and separate commercial structure, virtually doubling the size of her existing retail electric and plumbing supply store from 9,700 square feet to 17,600 square feet, the City of Tigard granted permission based on certain conditions. Pursuant to Tigard Community Development Code 18.120.180.A.8<sup>1</sup> and 18.86.040.A.1.b, the city council required petitioner to dedicate (1) land within the 100-year floodplain of Fanno Creek for greenway, (2) and a 15-foot strip of land adjacent to the floodplain to accommodate storm drainage improvements and for future use as a pedestrian and bicycle pathway.<sup>2</sup> *Dolan v. City of Tigard*, 854 P.2d 437, 439 and n.3 (Or. 1993). Petitioner sought a variance in a one-page application, which the city denied.

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<sup>1</sup> According to 18.120.180.A8: "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." The record does not reveal whether petitioner's property was purchased before or after the enactment of the statutes and regulations underlying the imposition of the conditions at issue.

<sup>2</sup> While the Brief for Petitioner at 8-9, n.2, refers to three other conditions, these other conditions were not contested.

Fanno Creek flows through the southwest corner of petitioner's property and along its southwestern boundary (Pet. App. E, p. E-3). At its closest point, the development petitioner proposed would be 8 feet from the boundary of the floodplain (Pet. App. G, p. G-42). Land within the floodplain is virtually unusable due to the year round water flow of Fanno Creek within a well-defined channel (Pet. App. G, p. G-39). Under City regulations, the floodplain area is not buildable land because it serves primarily as the actual stream channel of Fanno Creek (Pet. App. G, p. G-41).

The city council denied petitioner's request for a variance from the requirement for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes because the dedication was reasonably related to petitioner's request to intensify development on, and usage of, the site. 854 P.2d at 439. The increased impervious surface created by the almost 200% increase in the size of the proposed retail establishment would increase the amount of storm water runoff from the site to Fanno Creek (Pet. App. G, p. G-37).

The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.

854 P.2d at 439. The increased flow within the Creek would contribute to a rise in the 100-year flood elevation without allowing for channel modifications to be made to offset this increase in stream flow (Pet. App. G, p. G-40).

Channel modifications are needed to improve the channel's ability to transmit stormwater flows and to reduce the possibility of floodwater damages and threats to public safety (*id.*).

The city council also denied the second<sup>3</sup> of petitioner's requests, which sought a variance from the requirement of dedication of adequate areas for a bicycle/pedestrian path along the site's western side adjacent to Fanno Creek. The city council found the dedication "reasonably related to the request to intensify development of the site with a general retail sales use, at first, and other uses to be added later." 854 P.2d at 439.<sup>4</sup> The city also found that customers and employees would be able to use the pathway for their transportation needs. Creation of alternate transportation could offset increased traffic demand and congestion. 854 P.2d at 439.

Petitioner never contested the validity of the governmental purposes served by the conditions (Pet. App. D, p. D-7-8). Nor did petitioner challenge the adequacy of the findings made by the city council. 854 P.2d at 440.<sup>5</sup>

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<sup>3</sup> The two dedications were considered separately (Pet. App. G).

<sup>4</sup> Petitioner did not plan on demolishing the existing sales building until sometime after the new building had been completed (Pet. App. E, E-3, n.1). The building of the structure and the razing of the existing building constituted the first phase of the redevelopment of the site. In an intermediate step, a parking lot containing 39 parking spaces intended to serve the phase one building was proposed (Pet. App. G, G-9). No details were provided for phase two. 854 P.2d at 438.

<sup>5</sup> Even the dissenting justice of the Supreme Court of Oregon concurred that the conditions serve a legitimate state purpose. 854 P.2d at 445.



Furthermore, petitioner did not mount a challenge to the sufficiency of the nexus between the municipality's legitimate public purposes and the conditions imposed. Pet. App. D, p. D-8. The only challenge raised by petitioner was to the sufficiency of the nexus between the impacts of the proposed development and the conditions imposed in exchange for granting the permit to build. 854 P.2d at 440.

Throughout the appellate process, the two dedications were held to be reasonably related to the impacts of the first phase of the proposed development in a multi-phase redevelopment of the site. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992), LUBA affirmed the city council's decision, as did the Court of Appeals of Oregon in *Dolan v. City of Tigard*, 832 P.2d 853 (Or. App. 1992), and the Supreme Court of Oregon in *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993).

#### SUMMARY OF ARGUMENT

Prior "takings" decisions of this Court have considered the character and significance of the governmental action, whether the land-use regulation substantially advances that governmental purpose, and the impact of such regulation on the economically viable uses of the property. In this case, there is no dispute that the conditions imposed, in terms of the dedication of land within the floodplain for a greenway and the dedication of land adjacent to the floodplain for a pedestrian/bicycle pathway and for storm drainage, have substantial governmental purposes and that the conditions substantially advance those purposes. There is also no dispute that the conditions do not impinge on the economically viable uses of the land.

The question before this Court is whether a new standard should be imposed on governments, which would require them to demonstrate, in a takings challenge to a

developmental exaction, that the impacts created by the proposed development are "directly, substantially, and proportionately linked in both character and degree to the dedications." Brief for Petitioner at 10. Petitioner erroneously argues that this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), requires demonstration of an essential nexus between impact and condition.

*Amicus* City of New York joins respondent City of Tigard in urging that this Court reject the strict nexus test suggested by petitioner. Requiring governmental entities to demonstrate the "precise fit" between conditions they impose in exchange for permits to develop land would seriously handicap state and local governments in their efforts to obtain community benefits that would offset problems generated by the development. More to the point, the essential nexus test represents a radical departure from existing takings doctrine. In considering a takings challenge to a conditional permit, where the property owner is already receiving a benefit through the grant of the permit which could have been denied, courts should do no more than examine whether a rational relationship exists between the exaction and the impacts of the development.



## ARGUMENT

**THE STRICTER TEST PROPOSED BY PETITIONER IN TERMS OF A PRECISE FIT BETWEEN DEVELOPMENTAL EXACTION AND DEVELOPMENTAL IMPACTS IS NOT COMPATIBLE WITH THIS COURT'S PRIOR TAKINGS DECISIONS AND SERIOUSLY DISTORTS THE REQUISITE BALANCE BETWEEN PUBLIC NEEDS AND PRIVATE INTERESTS.**

**A. *Nollan* Does Not Require an Essential Nexus Between Condition and Exaction.**

Petitioner argues that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), requires the government to demonstrate the existence of a *substantial* relationship (also phrased as a "precise fit" or an "essential nexus") between the impacts of a proposed development and any conditions imposed on the property owner seeking to develop that property. Despite the prior formulation by this Court of a test wherein the term "substantial" was applied solely to whether a land-use regulation advanced a legitimate state purpose, petitioner asks this Court to apply the term "substantial" to consideration of the nexus between a conditional permit and the impacts of a proposed development.

The City of New York supports the position taken by respondent City of Tigard here, as well as the decision by the Oregon Supreme Court, that, in a challenge to a developmental exaction, the takings clause is not implicated if a reasonable relationship exists between the exaction and the proposed development. The City of New York urges

that tests heretofore applied not be altered to require demonstration of the precise fit urged by petitioner.

Under traditional takings analysis, a land use regulation does not affect a taking if it "substantially advances a legitimate state interest" and does not "deny an owner economically viable use of his land." *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). Such analysis involves an inquiry into "the character of the governmental action" and the "economic impact on the claimant . . ." *Penn Central*, 438 U.S. at 124.

Under the first prong of such a test, petitioner does not dispute the legitimacy of the purposes underlying the enactment of the municipal ordinances. Petitioner does not contend that the dedications of greenway in the Fanno Creek floodplain for storm water management and of a pedestrian/bicycle pathway alongside Fanno Creek fail to serve legitimate public purposes. *Dolan v. Tigard*, 854 P.2d at 440. Nor does petitioner directly challenge the sufficiency of the nexus between these conditions and the municipality's public purposes in imposing the required dedications. *Id.*

Under the second prong of this test, no argument exists that the municipality's conditions would render the land economically useless. Petitioner makes no claim whatever that she will suffer economic loss. To the contrary, the record reveals that the land to be dedicated is unusable precisely because it is within the floodplain of the creek. Dedication of the land adjacent to the floodplain for a bicycle/pedestrian pathway hardly threatens petitioner economically. It is not unreasonable to assume that the pathway, if built, will facilitate public awareness of petitioner's retail store and that petitioner wishes to

encourage the public to visit this commercial establishment.

The two conditions imposed by the City of Tigard survive such a takings analysis with flying colors. Absent an ability to succeed in her claim under the previously-formulated test, petitioner tries to create a new test which seeks to examine whether a developmental condition substantially advances legitimate public purposes.<sup>6</sup>

Petitioner seeks to capitalize on the supposed uncertainty left in the wake of *Nollan* as to the proper test to determine whether a land-use regulation "substantially advances a legitimate state interest." Petitioner argues that *Nollan*, instead of following the time-honored test that a reasonable relationship be demonstrated between the conditions imposed and the impacts of the proposed development, requires application of a stricter standard for this relationship. It is hard, however, to argue that *Nollan* requires such a stricter standard when this Court found no nexus whatsoever between the easement imposed on one-third of the *Nollan*'s property and the removal of obstacles preventing the public from using the beaches. 483 U.S. at 837.

Faced with a permit to build a beachfront house, which permit was conditioned on a lateral easement giving the public right of access across appellants' property, this Court in *Nollan* held that the easement imposed by the California Coastal Commission, if enacted independently, would constitute a taking because it interfered with an essential property right - the right to exclude others. If an exaction would be a *per se* taking under the "independent regulation" test, according to the *Nollan* Court, it still is not necessarily unconstitutional. The exaction may be justified as a *condition* for issuing a land-use permit.

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<sup>6</sup> Petitioner concedes that rejection of heightened scrutiny is fatal to her claim. Brief for Petitioner at 32.

In turning to this part of the analysis, *Nollan* followed the traditional test used by the Court in a takings challenge to a land use regulation: such a regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land. *Nollan*, 483 U.S. at 834; *Keystone*, 480 U.S. at 485; *Agins*, 447 U.S. at 260. Such a formulation clearly does not require governments to tie each application of an ordinance to specific evils, but rather assures that assertions of the public health, safety, or welfare must be more than merely illusory.

In a challenge to application of zoning ordinances, "judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan . . . ." *Penn Central*, 438 U.S. at 133, n. 29. There is no reason to urge that this Court should apply a stricter standard for the relationship between an exaction and its impact when focusing on conditional permits. Under petitioner's view, heightened scrutiny would attach in circumstances where the landowner is actually assured of some return benefit in that the condition or restriction is incorporated in a permit. It is rather bizarre to argue that a regulatory burden, which would survive a takings analysis if it were a zoning ordinance, should be subjected to stricter scrutiny when an explicit benefit is incorporated with the condition.

*Nollan* acknowledged that the Court had not elaborated on the standards for determining what type of connection must be demonstrated between the regulation and the governmental interest in order to satisfy the requirement that the regulation "substantially advance" that interest. Nonetheless, the Court acknowledged that a "broad range of governmental purposes and regulations" satisfy these requirements. *Nollan*, 483 U.S. at 834-35.



Furthermore, according to the *Nollan* Court, the California Coastal Commission could have conditioned construction upon some concession by the owner protecting the public's view of the beach. The condition imposed, however, utterly failed to further the end advanced as justification for the prohibition. The easement could only be used by people already on the beach. It bore no relationship to the removal of barriers preventing the public from using the beaches. Nexus was eliminated.

Thus, while petitioner argues that there must be a precise fit between an exaction and the burdens or impacts of a proposed development, the Court in *Nollan* saw no fit at all.

#### **B. Petitioner's Interpretation Is At Odds With Takings Law.**

The history of "takings" law does not support petitioner's interpretation. Takings law in this country began essentially with *Mugler v. Kansas*, 123 U.S. 623 (1887), and its holding that any exercise of the police power that was reasonably related to a legislative public purpose would be shielded from a takings inquiry. In *Mugler*, this Court made clear that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 123 U.S. at 665. That same Court held, *id.* at 669:

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not - and, consistently with the existence and safety of organized society, cannot be - burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason

of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

*Mugler* can hardly be dismissed as a century-old case dealing with a nuisance. Recently this Court acknowledged that the old "harmful or noxious use" analysis of *Mugler* and other nuisance cases serves as a precursor of the Court's current formulation that a land-use regulation does not effect a taking if it substantially advances legitimate public purposes. *Lucas v. South Carolina Coastal Commission*, 112 S. Ct. 2886, 2897 (1992). As the Court noted, the distinction between a condition that is "harm-preventing" and one that is "benefit conferring" lies in the eye of the beholder. *Lucas*, 112 S. Ct. at 2897.

Similarly, the concerns expressed in *Mugler* and in the seminal case of *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), addressing the needs of government in terms of land-use regulation, were recently re-expressed in *Agins*, 447 U.S. at 261. In *Agins*, the City of Tiburon used its police power to protect city residents from the ill effects of urbanization. The zoning ordinance at issue substantially advanced the legitimate government goals of discouraging the premature and unnecessary conversion of open-space land to urban uses. *Id.* This Court again resorted to a balancing of public and private interests. *Id.*

It is not illogical that "as concomitants of 'the advantage of living and doing business in a civilized community,'" landowners must bear "burdens consequent upon government action undertaken in the public interest . . . ." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984). *Keystone* made clear that deference must be granted to governmental interests and that the nature of the state's action is critical to a takings analysis. 480 U.S. at 488. In fact, *Keystone* upheld a law similar to that struck down in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), because this Court accepted that the

modern Pennsylvania law aimed at protecting the public health, fiscal integrity, and the environment by safeguarding surface land areas. *Keystone*, 480 U.S. at 488. These goals were so important that this Pennsylvania law could be upheld, against a claim by coal-mine operators that the Act took their property without just compensation, solely by reference to its purposes.

*Keystone* acknowledged the benefits that often occur from the restrictions placed on others, and further noted that governments and the courts do not need to calculate whether a particular individual has suffered burdens in excess of benefits. 480 U.S. at 491, n.21. This is precisely the type of thinking that petitioner rejects. For her, any burden she suffers must be in direct proportion to benefits she receives. Petitioner focuses on the "burdens" to her of the dedications, but ignores that she will benefit if her land is not flooded and if the area is improved so residents and visitors enjoy coming to her retail establishment.

While petitioner expresses outrage at the imposition of conditions in exchange for the granting of a permit to double the size of her retail establishment, takings analysis does not always yield to such outrage. As this Court stated recently in *Lucas*, 112 S. Ct. at 2899:

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . .

When the *Nollan* Court considered the issue of "public need" as justification for sustaining the easement, it did so against the background of a concession by the California Commission of a lack of nexus. The Court already had found that the Commission did "not even meet

the most untailored standards." 483 U.S. at 838. An argument of "public need," however, such as in the instant case, in the face of a reasonable connection between the impact of the proposed development and the condition should be accorded great weight.

**C. In A Just Compensation Challenge To A Conditional Permit, Scrutiny Is Appropriately Limited To Whether The Dedication Destroys the Economic Viability of the Property.**

According to the Eleventh Circuit, differing approaches must be accorded a just compensation claim, a due process takings claim that application of a particular regulation goes so far it destroys the value of the property, and a claim that a regulation is arbitrary and capricious because it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Eide v. Sarasota Co.*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The differences among these varying types of claims affect ripeness, proof, and remedy.

A just compensation claim bypasses the prong of traditional takings analysis which questions whether a particular regulation substantially advances a legitimate state interest. Such a claim assumes the validity of the regulation and that the regulation substantially advances legitimate government interests. *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992). A due process takings claim, on the other hand, by its very nature seeks to invalidate the regulation on the basis that the regulation goes so far it destroys the value of petitioner's property and, thus, has the effect of a taking by eminent domain.

Accordingly, petitioner's just compensation claim assumes the validity of the underlying ordinances. The only issue remaining under the Eleventh Circuit's analysis of a just compensation claim is whether petitioner has been



denied all, or substantially all, economically viable use of her property. *Reahard*, 968 F.2d at 1136. The economic impact of the regulation on the claimant is examined, as well as the extent to which the regulation has interfered with her investment-backed expectations. *Reahard*, 968 F.2d at 1136. After all, when government has rendered someone's property worthless, it generally has gone too far. "[F]or what is the land but the profits thereof[?]", *Lucas*, 112 S. Ct. at 2894, quoting 1 E. Coke, *Institutes* ch. 1, § 1 (1st Am. ed. 1812).

Such analysis appears in accord with the view expressed by one noted commentator that takings doctrine appears to be moving towards holding a taking exists if a regulation works a permanent physical occupation of private property by the government or undermines a distinct investment-backed expectation, or if the regulation totally eliminates the property's economic value or viability. In the absence of any of the above findings, a regulation categorically does not constitute a taking. Michelman, *Takings*, 1987, 88 Col. L. Rev. 1600, 1622 (1988).

**D. Rational Relationship Provides the Only Meaningful Test and Other Courts Properly Have Adopted This Test.**

Our state courts, who regularly must deal with this issue, have long understood and recognized that it constitutes a legitimate exercise of the police power for municipalities to require developers to return some benefit, commonly referred to as exactions, in exchange for the privilege of going forward with a particular project. "Exaction" is a generic term for the contribution required of a developer in exchange for the permission to develop. Note, "'Take' My Beach, Please!": *Nollan v. Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U.L. Rev. 823, 848 (1989) (hereinafter "*Exactions*"). Exactions allow municipalities to

require that private interests pay for the burdens on the community that a development creates.

Typical exactions include subdivision plans, wherein a municipality conditions approval of subdivision applications on the dedication of land for necessities created by the subdivision, such as streets, public parks, schools, sidewalks, and utility lines. Numerous enabling statutes exist which authorize local governments to adopt subdivision regulations requiring developers to dedicate certain improvements. In addition, where new developments will lead to increased use of pre-existing roads, municipalities have required developers to improve roads outside the development. It is also not unheard of for cities to condition permission for a new development, which will attract new workers and create a need for more housing, upon the developer's commitment to build some low-income housing. *Id.* at 849.

The City of New York urges this Court to recognize that, not only does the test proposed by petitioner have no basis in law, it conflicts with the realities of municipal governance. For instance, in 1982, the City Planning Commission and Board of Estimate approved new zoning regulations to govern the central business district of midtown Manhattan. While the rezoning increased the number of areas in which the highest density commercial and residential buildings could be built, the Commission and Board sought to minimize the impacts of the population of these new buildings on the sidewalks, streets, and subways. Therefore, included in the zoning regulations were requirements that all new buildings over 70,000 square feet be designed and built to provide on-site public improvements. The requirements allow for widening of the sidewalk to provide space for pedestrians to walk other than on the sidewalk; "through-block connections," i.e., passageways for the public to cross *through* the block; and, if the building is constructed on a corner which has a

subway stair in the sidewalk, an interior subway stairs so that sidewalk space can be recaptured for pedestrians. Examining such requirements under the microscope of a strict standard, that is one requiring a demonstration that the conditions "directly, substantially, and proportionately [are] linked in both character and degree" to the impacts of the development, would seriously tie the hands of the City of New York.<sup>7</sup>

More recently, in 1992, the City Planning Commission and City Council considered zoning and land use actions which would allow redevelopment of the 74 acre waterfront on Manhattan's West Side (formerly the rail yard). The Riverside South development is to consist of over 6 million square feet of housing, 600,000 square feet of retail and office space, 1.2 million square feet of television studios, and 12 parking garages. Pursuant to the City's Uniform Land Use Review Procedure and its City Environmental Quality Review, the development proposal and actions were subject to more than eighteen months of technical analysis, public review and hearings prior to vote and approval by the City Planning Commission. In granting approval, however, the Commission required that the developer agree to numerous conditions designed to insure all necessary urban services for the site as well as to mitigate possible environmental impacts. The conditions include construction of a 28-acre waterfront park with the capital costs of the park to be borne by the development; upgrading of the nearby subway stations; reservation of 12% of the housing constructed to be used for affordable housing; and construction of certain streets and infrastructure. Again, a strict-relationship test would ill

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<sup>7</sup> The City does not suggest that such requirements would not pass a stricter scrutiny, but includes these examples to demonstrate the complexity of issues facing municipalities in this area and the difficulties that would be engendered by the rigid test proposed by petitioner.

serve preservation of a proper balance between the public and private interests at issue here.

The City of New York must also deal with its watershed and must limit activities that can occur within certain distances of watercourses, wetlands, reservoirs, reservoir systems, and controlled lakes. For instance, to safeguard the City's water supply system, the City prohibits new impervious surfaces, except for roads, from being within 100 feet of a watercourse or wetland and within 300 feet of a reservoir, reservoir stem, or controlled lake. New roads are prohibited within 50 feet of a watercourse or wetland and within 100 feet of a reservoir, reservoir stem, or controlled lake.

There are other restrictions designed to prevent pollutants from entering the City's water supply which are a critical component of the City's effort to avoid having to filter its water supply. These restrictions involve storage of hazardous substances, storage of hazardous wastes, wastewater treatment plant seepage units or fields, septic system absorption fields, and junkyards.

As occurred in the City of Tigard, the need for such regulations and their impacts were analyzed by the City in an environmental impact statement. Furthermore, the regulations apply uniformly to all new development. The City of New York does not, and cannot, re-assess the need for such restrictions each time a project is proposed and then specifically tailor the restrictions to the specific problem caused by a particular parcel. Again, the reasonable relationship test is the only test that makes sense given the realities of municipal problems in safeguarding the public good.

The reasonable relationship test also has been adopted by most courts that have addressed the question. For instance, the Ninth Circuit followed this time-honored



test recently in *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) (rejected argument that *Nollan* imposed a higher level of scrutiny for consideration of a challenge to an ordinance conditioning certain commercial development on payment of a low income housing fee); *Leroy Land Development v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (the "substantial" requirement applies to the relationship between the conditions and the governmental purposes, not between the conditions and the impacts); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D. Or. 1992) (government not required to show that proposed developments would have a deleterious impact before requiring certain dedications).

The rational relationship test essentially originated in the State courts based on the constitutional notion that "any exercise of the police power must be reasonably related to a legitimate public purpose." *Exactions*, 69 B.U.L. Rev. at 851. Exactions were, and still are, considered to be land-use regulations which "offset the negative externalities that often accompany new development." *Id.* These "negative externalities" generally would justify a municipality in banning the development on the grounds that a ban would be reasonably related to a legitimate governmental purpose. *Id.* In this sense, developmental exactions offer an alternative to a complete ban. Rather than prohibiting the development, municipalities require developers to make some kind of contribution to offset its undesirable consequences.

The rational relationship test requires some nexus, but not the precise fit urged by petitioner here. *Ayres v. City Council*, 207 P.2d 1 (Cal. 1949) (four conditions imposed on subdivision were reasonably related to the needs created by the proposed development); *Bethlehem Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) (building permit subject to conditions for the provision of

public improvements); *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. Dist Ct. App. 1983) (upheld an ordinance requiring a developer to dedicate land, or pay a fee, for expansion of the county park system); *Lampton v. Pinaire*, 610 S.W.2d 915 (Ky. App. 1980) (upheld dedication requirements as a condition to plat approval because dedications were based on reasonably anticipated burdens of the development); *Petterson v. City of Naperville*, 137 N.E.2d 371 (Ill. 1956) (upheld ordinance requiring property owners to provide proper drainage facilities as a condition of subdivision approval); *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977) (a requirement imposed on a subdivider is permissible only "if the burden cast upon the subdivider is reasonably attributable to his activity"); *Billings Properties, Inc. v. Yellowstone Co.*, 394 P.2d 182, 188 (Mont. 1964) (an exaction that reasonably responds to a need created by the subdivision is within the bounds of the police power); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984) (adopted a reasonable-connection analysis); *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980) (affirmed use of reasonable relationship test); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 448 (Wis. 1965) ("a required dedication of land for school, park, or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of the police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of the approval of the subdivision."), *appeal dismissed*, 385 U.S. 4 (1966).

**E. This Case Does Not Provide a Takings Problem Under *Nollan*.**

Under *Nollan*, a permit condition, which serves the same legitimate police-power purpose as a refusal to issue the permit would serve, should not be considered a taking if the refusal to issue the permit would not constitute one. 483 U.S. at 836. Here, the City of Tigard could have denied the expansion permit in order to prevent the more significant drainage problems that would result from the increased impervious surface of the vastly expanded new building - the very same purpose that the dedication of land was intended to serve. Furthermore, the City of Tigard could have denied the permit to expand the commercial building out of concern that the increased traffic generated by the expansion, both pedestrian and vehicular, would add to the congestion in this area. Since denial of the permit here would serve the same governmental purpose as the conditions imposed, the conditions survive the independent regulation test of *Nollan*.

These conditions further survive analysis, under the second phase of the *Nollan* inquiry, a phase which this Court may not even reach since, as petitioner concedes, the dedications do not amount to a *per se* taking under the permanent physical occupation doctrine.<sup>8</sup> Under the second phase of the *Nollan* inquiry, a condition which if enacted independently would constitute a taking, does not violate the Fifth Amendment when considered as a condition, unless it fails to substantially advance legitimate state interests or denies an owner economically viable uses of his land.

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<sup>8</sup> Petitioner has abandoned its argument, raised in the Petition for Certiorari at 19-23, that the second condition must be considered a *per se* taking because it involves a permanent physical occupation of private property.

Here, the legitimate character of governmental interests in preventing flooding and minimizing an increasing problem with traffic congestion is not at issue. Petitioner makes no claim that the dedications interfere with her reasonable investment-backed expectations. Since land within the floodplain is unusable, the dedication of that land cannot remotely be considered to have interfered with what must be regarded as petitioner's "primary expectation concerning the use of the parcel." *Penn Central*, 438 U.S. at 136.

Under a rational nexus test, the city council for the City of Tigard, LUBA, the Oregon Court of Appeals, and the Oregon Supreme Court, all had no difficulty in finding a reasonable relationship between the proposed development and the conditions imposed. The Supreme Court of Oregon quoted at great length from the city's findings concerning the relationship between the dedications and the anticipated impacts of the proposed development, and further noted that petitioner did not challenge these findings. *Dolan v. Tigard*, 854 P.2d at 439. The city's unchallenged findings show that, since the proposed development would cover petitioner's property with a much larger building as well as with parking facilities, which developments would increase the site's impervious area and increase the amount of storm water runoff into Fanno Creek, it was not unreasonable for the city to require the dedication of a portion of the property for improvement of a storm drainage system. *Id.*, at 443-44. The city's unchallenged findings also demonstrated the reasonableness of the dedication of a pedestrian/bicycle pathway since increased traffic congestion would be generated by employees and customers as a result of development of the property. *Id.* at 443.

That the City of Tigard had plans encompassing Fanno Creek, which plans were set forth in ordinances enacted pursuant to state regulations, does not transform this into an inverse condemnation case. In response to



Oregon's requirement that its cities plan for adequate storm drainage, the City of Tigard undertook an engineering analysis which resulted in the Tigard Master Drainage Plan. The study identified a legitimate concern: increased urbanization of the area around Fanno Creek would increase the propensity of the creek to flood. Additionally, in response to the state's requirement that cities plan for future urban transportation needs, the City of Tigard developed a comprehensive pedestrian/bicycle pathway plan. Petitioner's site is located in downtown Tigard where congestion is at its greatest level. The city's plan for a bicycle/pedestrian pathway was intended to facilitate access in this downtown shopping area.

Petitioner can hardly claim that the "burdens" of the dedications were "so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justness and fairness' require that they be borne by the public as a whole." *Kirby*, 467 U.S. at 14. Nor can petitioner claim that the dedications prevent her from pursuing her "reasonable investment backed expectations." *Agins*, 447 U.S. at 262-63.

Petitioner has properly abandoned the argument, mentioned in her petition for certiorari, that the condition concerning the bicycle/pedestrian pathway constituted a *per se* taking. That doctrine has no application here. There is no permanent physical occupation. There is merely the dedication of land that may eventually be used to allow persons to pass and repass, but not to allow persons to remain permanently on the land. An "easement of passage, not being a permanent occupation of land" is not, without more, a taking of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

While *Nollan* falls within the permanent physical occupation doctrine because it involved the legal displacement by means of a deed restriction of one-third of

the total area of appellants' property (Appellants' Brief to this Court in *Nollan* at 5, 13), the same is not true here. It was not the passage and re-passage of persons that satisfied the permanent physical occupation test, but rather, as appellants argued, the deed restriction required by the California Coastal Commission (*Id.* at 19-20). Similarly, the United States argued that the California Coastal Commission's lateral access dedication requirements did "not qualify as 'permanent' in nature or as a physical 'occupation' of private property, since the public obtains only a right to 'pass and repass' and not a right to occupy permanently appellants' beach . . ." *Amicus Curiae* Brief for the United States in *Nollan* at 14-15.

Here, petitioner has not even sought to exclude the public from her property. Her plans for expansion involve the creation of 39 parking spaces, as well as three bike racks and a place for handicapped parking. The public is already invited on petitioner's land to shop at her retail establishment. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no takings where owner had opened his property to the general public).

Finally, there is not the government compulsion necessary to a finding that physical occupation of property constitutes a *per se* taking. The City of Tigard is not taking title to petitioner's land. It was only in response to petitioner's request to develop her property that the municipality required certain dedications. Government compulsion is absent here. Yet, "[t]his element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987).

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In conclusion, it is clear that "[u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make

of their property." *Keystone*, 480 U.S. at 491. At a minimum, municipal agencies and planning boards need to be able to condition approval of a development upon an exaction, particularly if the problem sought to be solved by the condition will be caused or exacerbated by the development. Conditions should not be struck down under the Takings Clause unless they make the land economically unviable for the property owner and fail substantially to advance a legitimate state purpose, that is, no rational relationship exists between the conditions placed on the use of the land and the development proposed by the property owner. Such is not the case here.

## CONCLUSION

**THE JUDGMENT OF THE OREGON  
SUPREME COURT SHOULD BE  
AFFIRMED.**

Respectfully submitted,

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